(1) 95-1666

No. _____

Supreme Court, U.S.
FILED
MAR 11 1996
CLERK

IN THE

Supreme Court of the United States

October Term 1995

ANTHONY AUGUSTAS BENNETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

David V. Liner
Counsel for the Petitioner
Of Counsel:
David R. Crawford, P.A.
One North Marshall
Post Office Box 20156, 27120
Winston-Salem, North Carolina 27101
(910) 777-1178

Appellate Printing Services • 2 South 6th Street • Richmond, VA 23219 • (800) 642-7789

34 pp

QUESTIONS PRESENTED

1) Whether the Fourth Circuit Court of Appeals erred by upholding the District Court's calculation at sentencing as to the amount of cocaine base for which Petitioner is accountable.

2. Whether the Fourth Circuit Court of Appeals erred by upholding the District Court's enhancement of Petitioner Guideline Range by three levels under U.S.S.G §3A1.2 for assault on a law enforcement officer.

LIST OF PARTIES TO PROCEEDING

United States of America (Respondent)

Anthony Augustas Bennett (Petitioner)

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES TO PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINION BELOW v

JURISDICTIONAL GROUNDS vi

REFERENCES TO PRIOR OPINIONS/DECISIONS . . . vi

FACTUAL BACKGROUND AND STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION. 7

CONCLUSION 14

ENTRY OF APPEARANCE AND CERTIFICATE OF SERVICE 15

APPENDIX

TABLE OF AUTHORITIES

Cases

United States v. Brooks, 957 F.2d 1138, (4th Cir.), cert. denied, 60 U.S.L. W. 3879 (1992) 7

Statutes

28 U.S.C. § 1254(1) vi

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, for which review is sought, is United States v. Anthony Augustas Bennett, No. 95-5048 and United States v. George Bennett, No. 95-5087 (4th Cir., Nov. 16, 1995) (per curiam)(unpublished). Petition for rehearing as to Defendant Anthony Augustas Bennett was denied on December 11, 1995. The opinion of the United States Court of Appeals for the Fourth Circuit and the Order denying the Petition for Rehearing and Suggestion for Rehearing en Banc are reproduced in the Appendix to this petition.

JURISDICTIONAL GROUNDS

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on November 16, 1995. A petition for rehearing with suggestion for rehearing in the banc was timely filed on November 30, 1995. Petitioner's request for rehearing was denied by order entered on December 11, 1995. The jurisdiction of this Court is invoked under Title 28, United States Code, § 1254(1).

REFERENCES TO PRIOR OPINIONS/DECISIONS

United States v. Anthony Augustas Bennett, No. 95-5048, CR-94-189, On Petition for Rehearing with Suggestion for Rehearing in Banc (December 11, 1995).

United States v. George Bennett, No. 95-5089, CR-94-189, On Petition for Rehearing with Suggestion for Rehearing in Banc (December 11, 1995).

United States v. Anthony Augustas Bennett, No. 95-5048 (4th Cir., November 16, 1995)(per curiam)(unpublished).

United States v. George Bennett, No. 95-5089, CR-94-189 (4th Cir., November 16, 1995)(per curiam)(unpublished).

NO. 96-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1996

ANTHONY AUGUSTAS BENNETT,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI

FROM THE UNITED STATES COURT OF APPEALS

FOR

THE FOURTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Untied Court of Appeals for the Fourth Circuit rendered in his case on November 16, 1995. Petitioner herein filed in the Court of Appeals a Petition for Rehearing and Suggestion for Rehearing in Banc, which was denied on December 11, 1995.

FACTUAL BACKGROUND AND STATEMENT OF THE CASE

Trial Proceedings:

Pursuant to the indictment of defendant for conspiracy to distribute cocaine base, in violation of Title 1, § 846 of the United States Code, six counts of unlawful distribution of cocaine base pursuant to § 841(a)(1), Title 1, United States Code, and use of a firearm during a drug trafficking crime pursuant to § 924(c)(1), Title 18 of the United States Code, defendant pled guilty to Counts 1 and 9, the conspiracy and

firearms charges, respectively, and the government did not object to a motion to dismiss the remaining counts. At sentencing the government adduced evidence through direct examination of officer Hayes Corbett that on six occasions between April 27, 1994 and June 22, 1994, defendant sold to Corbett various small amounts of cocaine base, the largest sale being approximately 15.1 grams on June 8, 1994. On June 22, 1994, agent Corbett contacted defendant by telephone and advised that he was ready to do business as previously discussed. Defendant then advised Corbett that he would meet him at the Hardee's on Clemmonsville Road. Soon thereafter defendant arrived at the Hardee's driving a Nissan truck with co-defendant George Bennett in the passenger seat. Defendant then advised Corbett that he would not do business at Hardee's and advised him to meet the defendants at the Wilco station. When Corbett and the defendants arrived at the Wilco station Corbett advised defendants that he was there to

do $20,000.00 worth of "crack." Co-defendant George Bennett then advised Corbett that he could get one half-pound of cocaine base for $10,000.00. Corbett then advised George Bennett that his boss man told him not to come back with less than one pound of crack, at which time Corbett showed co-defendants $20,000.00 in cash and said that he was ready to do business (JA 64-69).

After brief negotiations, agent Corbett and the defendants agreed that they would go to the parking lot of the Parkway Shopping Center in Winston-Salem, North Carolina to do business. Upon arrival thereat co-defendant George Bennett exited the Nissan truck and entered the vehicle of agent Corbett, whereupon defendant Anthony Bennett left supposedly to procure the "crack" (JA 69-75). Officers from the Winston-Salem police department, Forsyth County ABC Board, and other law enforcement agencies had the parking lot at the Parkway Shopping Center under surveillance. Agent

D.R. Burton of the Forsyth County ABC Board testified at the trial of George Bennett that he was conducting surveillance at the aforementioned shopping center and observed that the Nissan truck driven by Anthony Bennett never left the parking lot (JA 118-19).

After being gone about twenty minutes, Anthony Bennett returned to the location where Agent Corbett and George Bennett were parked (JA 101). Upon Anthony's arrival, Agent Corbett exited his vehicle and went to see the Nissan truck in order to see the product supposedly brought by Anthony. None was shown (JA 102). Upon approaching the driver's side of the Nissan truck Agent Corbett felt something cold and hard behind his ear. George Bennett, at that time, was pressing a pistol at the head Agent Corbett. Corbett then backed away in the direction of his vehicle, at which time law enforcement officers moved in and arrested both Anthony and George Bennett. As the officers moved in,

George Bennett threw the firearm he was holding into Agent Corbett's Jeep Cherokee (JA 76-81).

Sentencing Proceedings:

At defendant's sentencing, Agent Corbett testified that on six occasions he purchased "crack" from defendant (JA 31), the largest purchase being approximately 15.1 grams on June 8, 1994. Thereafter on June 22, 1994, co-defendant George Bennett discussed with Officer Corbett the sale of one half-pound of "crack," however, on that date no amount of cocaine base was ever in the possession of either defendant Anthony Bennett or co-defendant George Bennett, and at no time did defendant Anthony Bennett even leave the premises of Parkway Plaza in Winston-Salem, North Carolina, in an attempt to procure any "crack" (JA 268). A search of 191 Glendare Avenue, pursuant to the arrest of Anthony Bennett on June 22, 1994 revealed the presence of 19.7 grams of "crack" and $7,760.00 in a bedroom containing some

possessions of defendant Anthony Bennett. There was no additional evidence presented that clearly established that Anthony Bennett actually resided at that address.

REASONS FOR GRANTING THE PETITION

I. THE PETITION SHOULD BE GRANTED BECAUSE THE PANEL'S OPINION ALLOWS DEFENDANT TO BE ACCOUNTABLE FOR QUANTITIES OF DRUGS FOR WHICH HE LACKED BOTH THE ABILITY AND THE INTENT TO DELIVER, AND FOR ADDITIONAL AMOUNTS FOR WHICH HE IS OTHERWISE NOT ACCOUNTABLE.

Defendant posits that in affirming the district court's decision to hold defendant accountable for the one half-pound of "crack" discussed on June 22, the Fourth Circuit Court of Appeals misinterpreted and misapplied the holding in the United States v. Brooks, 957 F.2d 1138, 1151 (4th Cir.), cert denied, 60 U.S.L.W. 3879 (U.S. 1992). The holding in Brooks stated that "the court is required to exclude an unsuccessfully negotiated amount only when the defendant

lacked both the intent and the ability to complete the drug transaction."

The defendant contends that the district court and the panel herein misinterpreted the meaning of "negotiated amount" as elucidated in Brooks. While the co-defendants indicated through George Bennett that they were able to produce a half-pound of "crack," that amount clearly was not what Agent Corbett intended to purchase by his own statements. Since Corbett intended to purchase one pound of "crack" and the co-defendants only discussed through George Bennett providing one half-pound of "crack," there was no "meeting of the minds" and, therefore, no negotiated amount settled upon.

Based upon the totality of the circumstances, the defendant posits that the most reasonable interpretation of defendants' statements is that they were merely "puffing." Of extreme significance is that based upon all prior transactions,

defendant was never able to produce more than a 15.1 grams of cocaine base. Contrary to Brooks, there was absolutely no evidence in the instant case to establish that defendant had the financial ability to procure and sell one-half pound of "crack." Defendant knew well before June 22, 1994 from statements of Agent Corbett that he desired to deal in large amounts of "crack" on that date, and the best evidence of defendant's lack of ability to produce the same is the simple fact that he did not do so on that date.

The evidence is clear defendant lacked the intent, additionally, to produce a half-pound of "crack." Indeed, when defendant left the location of Agent Corbett at the aforementioned parking lot under the pretense of procuring the "crack," he in fact never left the parking lot, clearly evincing that he had absolutely no intention of procuring one-half pound of cocaine base on the day in question. As such, defendant contends that the evidence herein clearly

demonstrates that there was no negotiated amount with respect to a half-pound of "crack," and that defendants lacked both the intent and ability to produce a half-pound or pound of "crack." As such, defendant should not have been held accountable for the alleged negotiated one-half pound of cocaine base.

Although some of defendant's belongings were found at 191 Glendare Avenue in Winston-Salem, North Carolina, it was never clearly established that in fact he lived there. It is uncontroverted, additionally, that he was not charged with the drugs seized at 191 Glendare Avenue on June 22, 1994 and there is inconclusive evidence to connect defendant with the 19.7 grams of crack cocaine found at Glendare Avenue on the aforementioned date or the money found contemporaneously therewith. There is, additionally, no evidence whatsoever to connect those drugs and monies with a common scheme or joint venture involving either George

Bennett or Keith Fenton. The only person charged with possession of drugs found at that location, moreover, was Veronica Bennett, defendant's spouse.

The only evidence herein of the origin of the monies seized from 191 Glendare Avenue is that it contained $300.00 worth of monies from a drug sale by defendant on June 8, 1994, and the panel herein correctly held that defendant may not be held accountable for both the $300.00 and the drugs sold therefor. There is no evidence, additionally, to establish the monies were not pre-payment for drugs, in which case defendant is not accountable therefor. As such, defendant contends there is insufficient evidence upon which the District Court could conclude by a preponderance pursuant to the concept of relevant conduct that defendant is accountable for the aforementioned 19.7 grams of cocaine base and the conversion equivalent of the $7,466.00.

II. THE PETITION SHOULD BE GRANTED BECAUSE THE PANEL ERRONEOUSLY ATTRIBUTED TO DEFENDANT A THREE LEVEL INCREASE IN HIS SENTENCE BASED UPON ASSAULT ON A LAW ENFORCEMENT OFFICER PURSUANT TO U.S.S.G. SECTION 3A1.2 AND U.S.S.G SECTION 1B1.3.

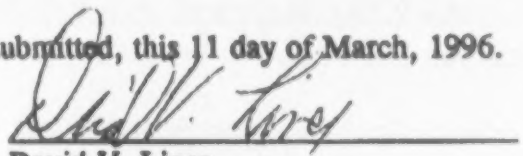
The Fourth Circuit panel concluded that defendant had the intent and the ability to distribute to Agent Corbett cocaine base, and then illogically concludes that it was foreseeable by defendant that co-defendant George Bennett would assault Officer Corbett. Clearly, defendant had dealt with Agent Corbett on many occasions and obviously was not aware that he was an undercover officer. There is no evidence, additionally, that defendant actually knew that George Bennett was carrying a weapon on June 22, 1994. The government's position with regard to the instant issue is that somehow George Bennett in the midst of a drug transaction became suspicious Agent Corbett, however, there is a dearth of evidence that any such suspicion was communicated in any

way to defendant Anthony Bennett. The clear inference to be drawn from Agent Corbett's testimony is that Anthony Bennett remonstrated upon George Bennett assaulting Officer Corbett and wanted to leave the premises. Based thereon, defendant contends there is insufficient evidence upon which to conclude by a preponderance that it was foreseeable by Anthony Bennett that George Bennett would assault a law enforcement officer during a drug transaction with knowledge or reason to know that he was an officer. As such, the three level increase in defendant's sentence was clearly erroneous.

CONCLUSION

For the foregoing reasons, defendant respectfully requests that this Petition for Writ of Certiorari be granted.

Respectfully submitted, this 11 day of March, 1996.



David V. Liner
Attorney for Defendant
Anthony Augustas Bennett

OF COUNSEL:

DAVID R. CRAWFORD, P.A.
One North Marshall
Post Office Box 20156, 27120
Winston-Salem, NC 27101
910/ 777-1178

NO. 96-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1996

ANTHONY AUGUSTAS BENNETT,

Petitioner

v.

UNITED STATES OF AMERICA,

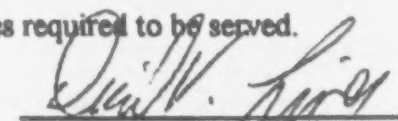
Respondent

ENTRY OF APPEARANCE AND CERTIFICATE OF SERVICE

I, David V. Liner, having been admitted to practice before the state and federal courts situated in North Carolina and before this Court, hereby enter my appearance in this Court

with respect to this Petition for Writ of Certiorari.

I further certify that today, March 11, 1996, as counsel for Petitioner, I have served one copy of the Petition for Writ of Certiorari (complete with Appendix) in the above-entitled case, by first class mail, postage prepaid, upon the Solicitor General for the United States Department of Justice, Tenth Street and Constitution Avenue, Washington, D.C. 20530, and upon counsel for Respondent, Benjamin H. White, Jr., First Assistant United States Attorney for the Middle District of North Carolina, Post Office Box 1858, Greensboro, NC 27402, the above being all parties required to be served.



David V. Liner
Attorney for Defendant
Anthony Augustas Bennett

OF COUNSEL:

DAVID R. CRAWFORD, P.A.
One North Marshall
Post Office Box 20156, 27120
Winston-Salem, NC 27101
910/ 777-1178

APPENDIX

APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. ANTHONY AUGUSTAS BENNETT, *Defendant-Appellant.*	No. 95-5048
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. GEORGE BENNETT, *Defendant-Appellant.*	No. 95-5089

Appeals from the United States District Court
for the Middle District of North Carolina, at Winston-Salem.
William L. Osteen, Sr., District Judge.
(CR-94-189)

Submitted: October 31, 1995

Decided: November 16, 1995

Before HALL, MURNAGHAN, and NIEMEYER,
Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

Gregory Davis, Assistant Federal Public Defender, Greensboro, North Carolina; David R. Crawford, CRAWFORD & WHITAKER, P.A., Winston-Salem, North Carolina, for Appellants. Walter C. Holton, Jr., United States Attorney, Benjamin H. White, Jr., Assistant United States Attorney, Greensboro, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

In these consolidated appeals, Anthony Bennett appeals the 240-month sentence he received following his guilty plea to conspiracy to distribute crack cocaine, 21 U.S.C.A. § 846 (West Supp. 1995) (Count One), and use of a firearm (a Taurus 9 mm pistol) in a drug trafficking crime, 18 U.S.C.A. § 924(c) (West Supp. 1995), 18 U.S.C. § 2 (1988) (Count Nine). George Bennett appeals his conviction for the same offenses and his 310-month sentence. George Bennett claims that the evidence was insufficient to establish his guilt, and also alleges that the district court's supplemental jury instructions were reversible error. George further contests the decision to hold him responsible for a half-pound of crack. USSG § 2D1.1.[1] Anthony challenges the district court's finding that he was responsible for a half-pound of crack and for an assault on a law enforcement officer. USSG § 3A1.2(b). We affirm.

Between April and June 1994, state undercover officer Hayes Corbett made a series of crack purchases from Keith Fenton and Anthony Bennett which culminated in the arrest of Anthony Bennett and his

---

[1]United States Sentencing Commission, *Guidelines Manual* (Nov. 1994).

brother, George, on June 22, 1994. Anthony pled guilty to conspiracy to distribute crack and to use of a firearm in a drug trafficking crime. George Bennett went to trial on the same charges and was convicted. Keith Fenton became a fugitive. The encounters between Corbett and the Bennetts are summarized as follows.

On April 27, Corbett called Fenton's cellular phone number, met Fenton and Anthony Bennett at a store, and bought 2.1 grams of crack from Fenton for $100. On April 28, Corbett bought 1.8 grams of crack from Fenton at a shopping center for $100. Anthony Bennett was with Fenton.

On May 10, Corbett bought 2 grams of crack from Fenton outside Fenton's apartment. He paid $160. On May 18, Anthony Bennett answered Fenton's cellular number, met Corbett and took him to a house on Harding Street which had been rented by George Bennett in February 1994. Corbett bought 2.2 grams of crack from Anthony for $100. Anthony told Corbett to come to Harding Street for crack in the future. On May 19, Corbett went to Harding Street. Fenton was outside; Anthony and George drove up together. Fenton asked if Corbett was ready to move up to larger amounts. They all went inside and Corbett bought 6.1 grams of crack from Anthony for $300. On May 25, Corbett bought 11.4 grams of crack from Anthony at Harding Street for $500. Anthony told Corbett he could handle any amount.

On June 8, Corbett went to Harding Street where he found Fenton, Anthony, George, and two other males in the house. After George and the two unknown males left, Corbett inquired about the price of one ounce of crack, then bought 15.1 grams of crack from Anthony for $600. On June 15, Corbett went to Harding Street and discussed buying a pound of crack with Fenton, the only person there. Fenton made a phone call and told Corbett the price for an pound would be $1200 an ounce. Later the same day, Corbett met Anthony, who said he could supply a pound of crack for $1000 an ounce at any time provided he had some notice. Corbett said he would call the following week.

On June 22, Corbett called Anthony from a Hardee's and said he was ready to do the business they had discussed the previous week.

Anthony and George came to the Hardee's together in a Nissan truck and they all drove to a car lot, supposedly to do the deal. At the car lot, Corbett told the Bennetts he had $20,000 and wanted a pound of crack. George questioned whether Corbett really wanted that much, but assured Corbett that he could handle that amount, and could get half a pound immediately for $10,000. Corbett said his boss wanted a pound. He showed the Bennetts $20,000 in cash which he had in the trunk of his Jeep Cherokee. The Bennetts then tried to persuade Corbett to come to Harding Street or to Anthony's residence, but Corbett refused.

They all drove to the parking lot of an animal hospital and talked again. Corbett said he would not go to a house because he was afraid of being robbed. Anthony said he did not have that much crack, but knew someone who did. However, he said it would look funny if he asked for that much at one time. The Bennetts asked Corbett to follow them to the house of the person who had the large quantity of crack. Corbett refused.

Next, they drove to a shopping center and parked. George got in Corbett's car to wait with him while Anthony drove away, ostensibly to get $20,000 worth of crack. A police surveillance officer observed that Anthony Bennett drove to another part of the parking lot, out of Corbett's sight, and parked. After about twenty minutes, a black van pulled into the space beside Corbett and the driver sat in the van for a few minutes, then made a phone call from a pay phone. George asked Corbett whether he knew the man. He then asked Corbett to drive around the parking lot, which Corbett did. When he returned to his original parking space, Corbett saw Anthony drive up behind him.

Corbett and George went to the passenger window of the truck. Corbett leaned in and asked to see the drugs. At the same time, he heard George say, "Hold it . . . you are the man," and felt a gun at his head. George threatened to kill Corbett and tried to make him get into the truck, which Corbett resisted. Anthony opened the door of the truck while George continued to threaten Corbett, trying to push him into the truck. Backup officers then arrived and arrested the Bennetts.

The apartment where Anthony Bennett lived with his wife was subsequently searched. In the master bedroom, a bag was seized which

contained 19.7 grams of crack and $7760 in cash, including $300 used by Corbett for the June 8th crack purchase. A handgun and a shotgun were also in the room.

At George's trial, defense counsel argued to the jury that George intended to rob Corbett of the $20,000 on June 22, but was not part of a drug conspiracy. During its deliberations, the jury sent out three questions:

> (1) Does the presence of drug money (dollars for the purpose of purchasing drugs), at a meeting for the holder of the money to buy drugs from more than one person, constitute a drug conspiracy offense?
>
> (2) Secondly, is it true if the drug purchaser intends to buy, but the alleged sellers have no intention to sell at that time (even though earlier sales had occurred)?
>
> (3) Three, if the alleged sellers (more than one), only intended to rob the purchaser, would the robbery (if a firearm was used), constitute a drug conspiracy offense (distribution, and use of a firearm during distribution), as defined by the Court in Count 9?

George's attorney suggested that the district court respond to each question by answering "No." However, the district court expressed concern that the jury was confused about how to apply the law of conspiracy, and was focused too much on the actions of George and the undercover officer rather than a possible agreement between George and his co-defendants.

After discussion with counsel, the district court told the jury that the answer to Question Three was no, if they found that George's only intent was to rob.

With regard to Question One, the court again answered no; but only "If you limit yourself to the finding of those facts only. . . . It does not constitute a drug conspiracy offense for one to take money somewhere in an attempt to buy drugs." The court reminded the jury

that there might be other facts which would assist them in finding whether George had been part of a conspiracy to distribute drugs.

The court answered Question Two by first reminding the jurors that the intention of the purchaser, an undercover officer, did not matter because they were determining whether George had agreed with the other defendants to distribute drugs. The court told them the answer was no, "if these are all the facts you find," but cautioned that there might be other evidence they would want to consider.

The court then told the jury, "[Y]ou are focusing in on the actual sales or the presence of parties at alleged sales to determine whether there was a conspiracy or not. That may aid you in determining whether there was a conspiracy, but that's not determinative of whether there was a conspiracy." The court finished by again instructing the jury on conspiracy. George was subsequently convicted of conspiracy and use of a firearm in a drug trafficking case.

George Bennett's Conviction

George Bennett argues that there was insufficient evidence to convict him of Count One (the conspiracy) because there was no evidence that he participated in drug sales to Corbett before June 22, and because there was no evidence the Bennetts actually intended to sell crack to Corbett on June 22. Therefore, he contends that the evidence showed at most that George intended to rob Corbett. He maintains that if his argument is accepted, the § 924(c) conviction cannot stand because he was charged with use of a firearm in a drug trafficking crime, not a crime of violence. We need not reach the second question because the evidence supports the conspiracy conviction.

A conviction must be affirmed if there is substantial evidence to support it. *Glasser v. United States*, 315 U.S. 60, 80 (1942). In applying this standard, evidence is construed "in the light most favorable to the government, assuming its credibility, drawing all favorable inferences from it, and taking into account all the evidence, however adduced." *United States v. Giunta*, 925 F.2d 758, 764 (4th Cir. 1991). To sustain a conspiracy conviction, "the government must show, first, that a conspiracy existed; then, that the defendant had knowledge of the conspiracy; and finally, that the defendant voluntarily became a

part of the conspiracy." *United States v. Bell*, 954 F.2d 232, 236 (4th Cir. 1992). The evidence showed that Anthony regularly made crack sales in George's house and that George had been present when one sale took place. On June 22, both Anthony and George responded to Corbett's call, and both discussed the difficulty of providing a pound of crack, and the possibility of selling Corbett a half-pound instead. This evidence supports the jury's finding that George actively participated in the crack conspiracy.

George Bennett next argues that the district court went beyond what was necessary to answer the jurors' questions by suggesting that they should consider evidence apart from the events of June 22 to determine whether George was a participant in a drug conspiracy. As a result, he claims, the court's response was impermissible. The necessity, extent, and character of supplemental jury instructions are a matter within the discretion of the district court. *United States v. Horton*, 921 F.2d 540, 547 (4th Cir. 1990), *cert. denied*, 501 U.S. 1234 (U.S. 1991). An error requires reversal only if it is prejudicial in the context of the record as a whole; the standard of review is whether the instructions "fairly responded to the jury's questions without creating prejudice." *United States v. United Medical & Surgical Supply Corp.*, 989 F.2d 1390, 1406-07 (4th Cir. 1993).

We find that the district court was justifiably concerned that the jurors had not fully understood the instructions already given them. It responded "no" to the jury's questions as defense counsel had requested. Beyond that, its admonition to consider all the evidence and its reinstruction on the law of conspiracy did not create any prejudice to George Bennett. Therefore, the district court did not abuse its discretion in its supplemental instructions.

George Bennett's Sentence

George Bennett argues that the district court erred in finding that he intended to sell Corbett a half-pound of crack on June 22 for two reasons. First, no sales near that amount had been made to Corbett previously and only 19.7 grams of crack were recovered from Anthony's apartment after the arrests. Second, neither defendant would

have contemplated selling crack to a person believed to be a law enforcement officer.[8]

The district court found that George negotiated to sell Corbett half a pound and had both the intent and the ability to produce that amount because Anthony told Corbett he could get it from someone he knew. Further, the court found that the defendants became suspicious that Corbett might be a policemen during their negotiations. The initial intent to produce the negotiated amount was sufficient to make George accountable for that amount. USSG § 2D1.1, comment. (n.12) (negotiated amount excluded only if defendant lacked both intent and ability to produce it); *United States v. Brooks*, 957 F.2d 1138, 1151 (4th Cir.), *cert. denied*, 60 U.S.L.W. 3879 (U.S. 1992). The court's finding was not clearly erroneous.

Anthony Bennett's Sentence

Anthony also argues that he lacked the intent and the ability to produce the negotiated half-pound of crack because previously he had sold much smaller quantities to Corbett and because he brought no crack to the meeting on June 22. At his sentencing hearing, the district court found that Anthony intended to sell Corbett a half-pound based on his previous sales to Corbett and his assurance to Corbett on June 15 that he could supply a pound. The court found, and the defense conceded, that the intent to sell a half-pound was sufficient for Anthony to be accountable for it, even if he lacked the ability to produce it.

Although it appears that Anthony became suspicious of Corbett during the June 22 meeting, the court's finding that he initially intended to sell a large amount of crack to Corbett is not clearly erroneous. Anthony sold crack to Corbett in ever-larger amounts in May and June. On June 22, after Corbett rejected a half-pound as too little, Anthony said he had a source who could supply a pound of crack. He was hesitant to request that much and may have used the phone he

[8]George Bennett's statement of issues identifies "reasonable foreseeability" as the issue. USSG § 1B1.3(a)(1)(B). But his argument focuses on whether the half-pound negotiated was excludable under Application Note 12 to USSG § 2D1.1.

had in his truck to ask someone to inspect Corbett. However, the court could find on the evidence that, before he became suspicious, Anthony intended to sell Corbett as much as a half-pound of crack.

Anthony contests the inclusion of the 19.7 grams of crack found on the bed in his apartment, and the conversion equivalent of the $7466 in cash found in the same bag. Except for the $300 in marked bills which Anthony had received for drugs which were separately counted as relevant conduct, the drugs and money found in Anthony's apartment were properly included to compute his base offense level. However, inclusion of these amounts did not change his offense level once he was properly held accountable for the half-pound of crack.

Last, Anthony challenges the sentencing adjustment made under guideline section 3A1.2(b) for assault on a law enforcement officer. Count Nine, the § 924(c) charge to which Anthony pled guilty, specifically charged use of the Taurus 9 mm pistol which George used to threaten Corbett. Anthony admitted in a statement to the probation officer that he could reasonably foresee that George would be carrying a gun on June 22 because he often did. Corbett testified that, while George was threatening to kill him and trying to make him get into the Nissan truck, Anthony opened the door of the truck so that George could push him inside. On these facts, the enhancement for assault on a law enforcement officer was properly made in Anthony's case.

We therefore affirm George Bennett's convictions and sentence and Anthony Bennett's sentence. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-5048
CR-94-189

FILED
December 11, 1995

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

ANTHONY AUGUSTUS BENNETT
Defendant-Appellant

No. 95-5089
CR-94-189

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

GEORGE BENNETT
Defendant-Appellant

On Petition for Rehearing with Suggestion for Rehearing In Banc

The appellants' petitions for rehearing and suggestions for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestions for rehearing in banc, and

As the panel considered the petiitons for rehearing and is of the opinion that they should be denied,

IT IS ORDERED that the petitions for rehearing and suggestions for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague

Clerk